

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

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**1999 U.S.-BRAZIL  
COMBINATION SERVICE CASE**

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) **Docket OST-99-6284**  
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**MOTION FOR LEAVE TO FILE  
AND CONSOLIDATED REPLY OF  
DELTA AIR LINES, INC.**

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**August 25, 2000**

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Delta is constrained to respond to the erroneous answers of American, United and Houston. Contrary to those parties' assertions, American's announced cancellation of its four Orlando-Brazil frequencies is highly relevant to the Department's decision in this case. Moreover, since American is now seeking to redeploy its canceled Orlando frequencies to another U.S.-Brazil route, and other U.S. carriers, including Delta, are attempting to finalize their Winter Season schedules, it is imperative that the Department bring this case to a swift conclusion so that carriers can (1) implement the services resulting from the Department's awards, and (2) most effectively deploy their other existing frequencies in the context of the Department's decision.

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<sup>1</sup> To the extent necessary, Delta requests leave to file this reply. Delta's reply is necessary to correct the inaccurate statements and characterizations concerning Delta's comments made in the answers of American, United, and Houston.

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Delta is not suggesting that American's four canceled Orlando frequencies are directly at issue in this case. Rather, American's evident difficulty in effectively deploying its large existing allotment of U.S.-Brazil frequencies is highly relevant to whether American should get even more permanent Brazil frequencies. To claim otherwise is to ignore one of the most important factors giving rise to this case. Thus, the fact that "American already holds 42 of the [then] 84 weekly frequencies [] available in the U.S.-Brazil market . . ." and the fact that there was no other designated carrier able to use the frequencies led the Department to reserve "greater flexibility with respect to allocating the frequencies than in the usual case," and the Department awarded American the seven *pendente lite* frequencies only "with the understanding that we may reexamine the merits of that allocation in a proceeding dealing with the longer term needs of the market." Order 96-3-7 at 3, 4.

For various self-serving reasons, the answering parties would prefer that the Department ignore the recent and highly relevant information pertaining to American's Brazil service cancellations, and urge the Department to decide this case in a vacuum. However, to do so would fail to take important public interest considerations into account, and would be contrary to the stated objectives of the Instituting Order to determine the best use of all the available frequencies to meet the "long-term needs of the market." Order 99-9-23 at 5.

Delta responds more particularly to the arguments of the answering parties as follows:

#### American

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The position espoused in American's answer that its four canceled frequencies "have nothing to do with this proceeding" is completely incongruous with the pages of exhibits and arguments American submitted claiming that "Nonstop Service in the JFK-Rio de Janeiro Market Depends on Granting American's Application." See, e.g. AA-R-102. Thus, it is American that has linked its ability to continue New York-Rio de Janeiro service with the receipt of seven more *pendente lite* frequencies on top of the 42 permanent frequencies it already holds. Delta's Brief pointed out the fallacy of this argument,<sup>2</sup> and American's recent Brazil service cancellations only serve to further prove Delta's point.

It is abundantly clear that nonstop service on the New York-Rio de Janeiro route does not "depend" on granting American's application for the *pendente lite* frequencies, given that American has been unable to make consistent and productive use of all of its existing frequencies. If American would prefer to use its permanent frequency allocations for Miami-Rio de Janeiro service (as American has indicated it will do with the four canceled Orlando frequencies, and as American previously sought to do with the seven *pendente lite* frequencies it moved from New York), then that is American's choice.

However, it would not be in the public interest for the Department to waste seven valuable *pendente lite* frequencies on American's chronically under-performing New York-Rio de Janeiro service – which American itself has shown little enthusiasm for operating.

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<sup>2</sup> See Delta Brief at pp. 3-4 and 19-20.

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Service on the New York-Rio de Janeiro depends on American's willingness to provide such service in light of other seemingly more attractive alternatives for American's generous allotment of 42 permanent Brazil frequencies – which American has been moving from one gateway to another.

Indeed, given American's obvious preference for Miami-Rio de Janeiro over New York-Rio de Janeiro service, it appears that American is primarily interested in applying for *pendente lite* frequencies at New York to absorb scarce limited entry frequencies.

Contrary to American's assertions, its large holding of 42 permanent Brazil frequencies is very much at issue in this case. In fact, as discussed above, it was a major factor that compelled the Department to award the New York-Rio de Janeiro frequencies on a conditional basis and to put American on notice that the frequencies would be subject to recall in a further proceeding to examine the long term needs of the U.S.-Brazil market. The very circumstances that led the Department to impose those conditions have now come to pass, *i.e.* a significant imbalance in the U.S.-Brazil market structure and the existence of a new designated carrier able to use the frequencies (to say nothing of American's default with respect to its unauthorized use of the conditional New York-Rio de Janeiro frequencies for Miami-Rio de Janeiro service).

Consistent with the Department's intent in imposing those conditions, as well as the objectives of the Instituting Order to consider the long-term needs of the U.S.-Brazil marketplace, awarding the seven *pendente lite* frequencies to Delta -- the most frequency

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impaired U.S. carrier to Brazil -- would best improve the U.S.-Brazil competitive market structure. The fact that American holds six permanent frequencies to every one of Delta's and the fact that American has not been able to productively and consistently use its huge allocation of 42 permanent Brazil frequencies are most certainly relevant to the Department's decision.

American claims that its canceled Orlando frequencies are "no more in issue here than are Delta's existing frequencies to serve Brazil." AA Answer at 1. However, Delta's existing frequencies are not an issue in this case because, unlike American, Delta has consistently fully utilized its modest allotment of seven frequencies for Atlanta-Brazil since the frequencies were awarded in 1997. Moreover, Delta has made the most of its limited opportunities, having developed the Atlanta-Brazil route to support large-capacity MD-11 service, one of the largest aircraft in Delta's international fleet.<sup>3</sup>

### Houston

Houston's answer mischaracterizes Delta's comments and erroneously suggests that the Department cannot consider alternative combinations of frequency awards (other than as strictly proposed by the applicants) in order to reach the best public benefits maximizing result.

To be sure, Delta firmly believes that the best overall result would be to reallocate *all ten* frequencies Delta has requested – seven for Delta's New York-Sao Paulo-Montevideo

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<sup>3</sup> American operates the New York-Rio de Janeiro route using short-body B-767-200 aircraft  
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service, and three for Delta's nonstop Atlanta-Rio de Janeiro service. Delta is certainly not advocating that American receive any award. However, if the Department wanted to facilitate American's ability to provide New York-Rio de Janeiro service, American could readily provide such service without any disruption to its existing operations with an award of three *pendente lite* frequencies in conjunction with the four frequencies American had used for its Orlando-Brazil operation.

Houston is incorrect in its assertion that "there are no grounds on which the Department can award three of the eleven frequencies to American." (Houston answer at 2). In fact, the Department has, on numerous occasions, awarded carriers fewer frequencies than were proposed in the route case applications. See, e.g. U.S.-China Air Services Case, Orders 99-8-9 and 99-6-17 (Awarding United five frequencies for San Francisco -Shanghai service, where United had proposed daily service.). See also, 1990 U.S.-Japan Gateways Proceeding, Order 90-10-5 at 34 (Awarding six frequencies each to Delta, United and American, notwithstanding the applicants' preference to operate daily service patterns.)

Likewise, although American has not submitted an application for precisely three frequencies, the Department is free to award American fewer frequencies than it has requested. And, as noted in Delta's Comments, should American receive an award of three *pendente*

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– the very smallest long-range international aircraft in its fleet.

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*lite* frequencies for New York-Rio de Janeiro service, the four frequencies from American's canceled Orlando flight give it the ability to maintain daily service at New York without reducing service at any of American's existing Brazil gateways. If, as suggested by Houston, American is unwilling to accept an award of three frequencies, that authority would revert to and be utilized by a backup award recipient. (As noted, Delta is fully prepared to utilize ten frequencies.)

Contrary to Houston's assertions, there is nothing "incongruous" about the various alternative award possibilities noted by Delta in its Comments. To be perfectly clear, Delta does not believe that American should retain *any* of the *pendente lite* frequencies, since the greatest public benefits would be created by authorizing both Delta's New York-Sao Paulo and Atlanta-Rio de Janeiro proposals. Nonetheless, the scenario outlined above (combining an award of four *pendente lite* frequencies with three Continental default frequencies) would inject Delta as a strong new nonstop competitor between New York and Brazil and South American, and is most certainly preferable from a public benefits standpoint than any other combination of awards that fails to authorize Delta's highest ranked daily New York-Sao Paulo service proposal.<sup>4</sup>

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<sup>4</sup> Unlike other less competitive routes such as Houston-Sao Paulo and JFK-Rio de Janeiro, it is vitally important that Delta receive seven frequencies in order to operate JFK-Sao Paulo service. If Delta is not able to operate a daily pattern of service, it would be at an untenable competitive disadvantage relative to the established incumbents.



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Given the extreme weakness of Continental's one-stop Houston proposal (amounting to nothing more than three weekly narrow-body tag flights tacked onto its existing Houston-Lima service), it is all but inevitable that the Department will reallocate Continental's Houston default frequencies to more productive nonstop service. Out of the entire pool of 105 U.S.-Brazil frequencies, no carrier operates via an intermediate stop in a third country (which diminishes both the available capacity and relative convenience of the service). Whether for New York-Sao Paulo or Atlanta-Rio de Janeiro service, Delta would use three frequencies to provide 195 *nonstop* seats to Brazil, compared to just 90 *onestop* seats for Continental at Houston.

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**United**

United contends that Delta's Comments "relate to matters outside the scope of this proceeding," and that Delta's comments are "mooted" by American's announcement that it intends to utilize four canceled Orlando frequencies to provide additional Miami-Rio de Janeiro flights. Neither of these assertions is correct. Moreover, United's true motives in opposing Delta's pertinent Comments appear to be more related to United's desire to block competitive entry by Delta at New York, in light of United's slim prospects in this route case and questionable ability to implement its service proposal.

First, as Delta explained in its response to American, American's large number of existing frequencies and its demonstrated inability to consistently and productively use them are most certainly at issue.

Second, Delta's comments are not "mooted" by American's announcement that it intends to move the four canceled Orlando frequencies to Miami-Rio de Janeiro service later this year. To the contrary, this underscores the importance of the Department taking all factors into account, and reaching a decision as quickly as possible, so that carriers can make the most expeditious planning decisions for their winter season services. Thus, if American has any legitimate interest in providing daily New York-Rio de Janeiro service, it is highly likely that American would move the canceled Orlando frequencies to New York rather than Miami, if

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American was aware that it would receive three, rather than seven, *pendente lite* frequencies for use at New York.

For United's part, it is evident that United would rather not face a vigorous new nonstop competitor on the New York-Sao Paulo route. Thus, United would prefer to avoid another allocation scenario that would enable Delta to begin daily nonstop New York-Sao Paulo service. If United seriously believes its own contention that "there is too much Brazil capacity at the New York gateway" (UA answer at 2), then United is free to move its own JFK-Sao Paulo frequencies to Los Angeles.

Finally, in light of the fact that United is itself proposing a daily nonstop service pattern at Los Angeles, it is somewhat surprising that United would not favor maximizing daily award possibilities in this case, and instead chose to oppose Delta's Comments. However, an explanation suggests itself in that United has just withdrawn its service proposal in the U.S.-France Frequency Allocation Proceeding (OST-00-7628), because United has found that its chronic reliability problems require "United to reduce its system-wide scheduled block hours of aircraft operations." See Motion of United to Withdraw Application (August 24, Docket OST-00-7628). In these circumstances, United's willingness and ability to honor its route case commitments here – which would require a substantially greater commitment of crew and aircraft resources – are clearly in doubt.

**Conclusion**

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American's announced Orlando-Brazil service cancellation provides additional highly relevant and persuasive evidence that American does not need and should not be permitted to retain seven *pendente lite* frequencies in order to operate its service proposal in this case.

Maximum public benefits would result from an award of ten frequencies to Delta for its New York-Sao Paulo and Atlanta-Rio de Janeiro proposals. However, the four surplus Orlando frequencies create additional allocation possibilities, whereby the Department can authorize one full daily service pattern by combining an award of four *pendente lite* frequencies with the three Continental default frequencies. Given that Delta holds just seven frequencies – enough for just a single daily Brazil

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service – Delta should receive the highest priority consideration to operate its proposed daily New York-Sao Paulo proposal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Consolidated Reply of Delta Air Lines were served this 25th day of August, 2000, upon all of the persons listed on the attached Service List by 1<sup>st</sup> Class U.S. Mail.

/s/

Helena Richardson

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